91-35

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME V

RICHARD ZIPSER (P22747)
Attorney for Petitioner Towne
1760 S. Telegraph Road
Suite 300
Bloomfield Hills, MI 48302
(313) 253-0740

HAROLD GUREWITZ (P14468)
Attorney for
Petitioner Fitzsimmons
3600 Cadillac Tower
Detroit, Michigan 48226
(313) 963-8155

72pp.

TABLE OF CONTENTS

Page

anscript: Schultz/Fitzsimmons

lephone Conversation of 5/1/85

a.m., Continued from Volume IV) . . .270

morandum Opinion

ated January 13, 1987) 320

F

L

F

L

F

L

F

L

Right.

Hah hah. Huh?

Yep, but that's the, it's the only way that, I'II tell you what, the way GENERAL MOTORS feels about it, it's cheaper to do it that way than . . .

Oh yeah. Yeah.

. . . pay the employees.

Well, hire them through the U. A. W. again.

Yeah.

Well, I got, I gotta tell you somethin'. I don't know where it's all going, The unions are losing their membership and sooner or later they're gonna have to, uh, merge together because the only one that has any clout is the TEAMSTERS. They can stop things.

So, what you gotta do is build up another monster for the future because as the U.A.W. membership declines, the A.F.L.C.I.O. declines and the TEAMSTERS, you know, know what I mean?

(Knocking)

Better unlock the door, uh, decline.

(Sound of door opening)

They're, they're, they're gonna have to get together. It's, support themselves, these guys. 'Cause the money's going down. You follow? The service employees.

Mm hmm.

You know what I mean? All these, all these (unintelligible) unions, uh.

FF

LS

FF

LS

FF

LS

FF

LS

Oh, I think, I think in the next ten years you're gonna see such a difference in, uh, labor unions you can't believe it.

You think they're on their way out?

What?

No, I don't think they're on their way out.

Yeah, yeah, but they'll merge.

They have to, to one force, force and, and, and to be powerful.

They'll probably be more powerful.

No, I don't think.

No?

I don't think, eh, you'll ever see them get the power they have to . . .

No, I'm talking about together, if they merge, they would be a big power.

F: Well . . .

S: But.

F: You know, hey, LENNY.

S: They won't be big, but.

F: The power, the power is shit.

S: Yeah.

F: The power is gonna be a different kinda power.

S: Yeah.

F: And power is gonna be a political power.

S: Yeah.

F: Power's gonna be, uh, social power.

S: Yeah.

F: Uh, it's not gonna be a power to, uh, drive prices out of, outta sight and create inflationary situations.

S: But they did this all this time,

F: Right. They . . .

They, they screw themselves around.
But they, but they learned from that.
Yeah.
You know, you learn from that.
Well, how do you tell guys to go backwards that have mortgaged themselves up?
Well, you don't tell guys to go backwards. You be and you do it, you do it now in the front.
Yeah.
You tell 'em what, this is why and, and this is why you can't do it.
You know, I preached that for twenty somethin' years.
Oh, yeah.
Remember, I use to say, hey, you know what? You guys are building your own goddamn death warrant

here. What you're doing here is knocking the boss out of the box that writes you a paycheck. I use to scream that all the time. And what you're doin' is you're gonna put 'em out of business and you're gonna lose your job where you gonna go? Follow? So, the guy that starts going up the ladder, so he buys a boat, you know. He goes to SEARS AND ROEBUCK and signs. He goes here, he goes there. And he buys a better house and what happens is now he's got a bunch of payment books.

FF:

Well, that's, that's what you're . . .

LS:

Well, he says to me. Now he says I can't take a, a dollar an hour decrease.

FF:

LS:

FF:

LS:

FF:

Well, no, you can't. Hey, that's hard to do. But I mean you just throw it down in the front. You say it's just like the NATIONAL... Should have gone back years ago. . . . NATIONAL FREIGHT contract. Whatta you think the stock holders do? The stock holders of GENERAL MOTORS and FORD and everything. They don't wanta hear no bullshit. They tell 'em hey, if you can do it cheaper in Taiwan and Japan, go build factories there. That's where our investment goes.
Yeah, but that, that, uh, that there's gonna run outta gas, too.
Well, look at PRESSER with the Master Contract now.
Well, hey, that's what shoulda been done a long time ago.

LS: Well, where's he going? He's headin' for prison.

FF: That should of happened a long time ago.

LS: Yeah.

FF: He's a goddamn . . .

LS: He's an old thief from way back. That guy's a big thief. You know that.

FF: Yeah.

LS: You know, one of the big thieves. But, listen, was your ever close with him?

FF: Oh, fuck. BILL and my, BILL, BILL PRESSER and my dad were thick as thieves.

LS: No kidding? I can never figure him for LEONARD (unintelligible). (Laughs) Shit. Huh? There's a guy, huh? Huh?

FF: Haven't seen or heard from him.

LS: Yeah, I seen him. You think he'd come to ya and help you out.

FF: Fuck no.

LS: Look what your dad did for him, huh?

FF: Just like, oh, there's so many of 'em I've fucked.

LS: Go right down, right down on the list. I wanta tell you "somethin'. I hate to tell you this. But I'II tell you somethin'. God, I don't want you to think that I'm doin' this here to be a smart ass or nothin', but you're in such a fuckin' bad position I wouldn't even take a chance if I was you. You're gonna get yourself nailed for a while lot of time and you, and you're gonna sit in the fuckin'

can with these cocksuckers, huh? Are you? I mean maybe you don't know nothin' about this case, but you oughta talk to somebody where they can do yourself some good. Help out the elsewhere. That's what you do, make yourself a deal somewhere if you can. I'II tell you somethin'. It ain't like the other old days no more. I'm tellin' ya, everybody, I, you know what? I can't go near anybody no more. I mean you don't know who you're talkin' to.

FF: Mm hmm.

LS: And they're gonna do it to you. Understand? I'll tell ya, that's the way MARTY says, you know. I was talkin' to MARTY. MARTY says, you know what? How long is the guy

gonna take the bullshit? You know, he sits there and he, and ya keep throwin' him in jail and when you get done with this, they'll find somethin' else. It ain't gonna end, ever.

FF: Mm hmm.

LS: And, uh, you, you know. You, you just gotta go see somebody confidentially and, uh, say to 'em, hey, maybe I can't do nothin' here, but I sure can help you elsewhere. You know.

FF: Yeah, but you see LENNY, I'm not, I'm, I'm, I'm, uh, it, it's really difficult to say.

LS: Uh huh.

FF: But, you know, Senior and I just never really were what you'd call close, see?

LS: Yeah, I know that.

FF: He never, uh, confided in, a lot in, in . . .

LS: I know.

FF: . . . anything's said outside of that hall. The only things I truthfully knew, I knew the inner workings and the outer workings. . .

LS: Right.

FF: . . . of the union.

LS: Yeah. But you know what? I gotta tell you somethin'. You know, there was some, uh, talk on the street, ya know, certain people that, ah, that your dad didn't want JIMMY alive. You know what I mean? You know that, and, uh, there was rumors that he was involved because he was here in Detroit with a JIMMY

Q and that, that VITALE guy, PETE VITALE. He was seen with him at a restaurant. Follow?

FF: Uh huh.

LS: And, uh, hey, those are two bad guys. Do I have to tell you about them? You know. They didn't, those guys wouldn't give you the sweat off their balls, DICK. Did you hear me? Those two guys would shit on you, but use you. Did you hear me? I did some labor relation for, work for MIDWEST PAPER that, uh, what's his name was doing, uh, PHIL LANGER (phonetic)? I didn't know it. So, they had some problem and, uh, my son's, uh, uh, father-in-law was a social friend of the president of the company and when he had this problem, so my

son's father-in-law says, uh, why don't you talk to, uh, LEONARD and let him handle some of it. And he, the guy comes up while I was, don't tell me that he's got PHIL LANGER doing anything. And whatta you think these two guys tell me, huh? They call me down to a meeting with TONY. Of all times, understand, of all goddamn times, during the HOFFA thing. And I go down there. They wanta talk to me, they're gonna arbitrate this thing and I go down there and here's these two, this present owner of this here MIDWEST PAPER and a guy from Cleveland, from the Cleveland office and we got into a situation there and whatta you think JIMMY Q and, and PETE VITALE tell me? Whatever, how

much did you get for a fee? I says, uh, I got three thousand dollars. That was my fee for, for, for my services. And they said to me, well, you should give it to PHIL LANGER. I says, hey, wait awhile, just a second. I got a check for that. I pay income taxes. Did you hear me? And you're tellin' me I should give it back to him? I did the work. I didn't even know. He said, well, you should know bette. not to go there. Did you hear th.? These are nice guys, so I said to TONY, I said, these are your friends? I says, you brought me down here for this shit? Hey, I'II see ya, goodbye, fuck ya. You know what I mean? Don't tell me what to do.

And who to represent. And I got mad. But that's the kinda people you're dealin' with. The shit of the world. I'm tellin' ya. This is what it is. And look, look, look what, what they do. Look with MAXIE, you know. Hey, uh, TONY and MAXIE never got along. They were like that on me, jealousy, whatever, whatever was there. But, uh, me going down there once in a while, I use to go 'cause, yeah, I like MAXIE, you know, he's a good hearted soul and look how many guys got . . .

(Tape cuts off)

(End of conversation)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ITED STATES OF
ERICA,

Plaintiff,

Crim. No.

ARLES F. COLLINS, 84-20715
ANCIS RICHARD
TZSIMMONS, Hon. Ralph
RRANCE L. PORTER, M. Freeman
L C. SCHWARTZ,
D ROGER TOWNE,

Defendants.

_____/

MEMORANDUM OPINION

On December 21, 1984, a federal
and jury returned an indictment charging
e above-named defendants with violations of
tle 18 of the United States Code. The
incipal charges are brought under the
cketeer Influenced and Corrupt

Organizations Act (RICO), 18 USC Sections 1961-68. Count I charges the defendants with a substantive RICO violation, under section 1962(c), and Count II charges the defendants with conspiracy to violate RICO, under section 1962(d). The remaining six counts of the indictment charge four defendants, individually, with violations of 18 USC Section 1954,[1] which in general prohibits the payment of kickbacks and bribes

---

[1] In Count III, Defendant Towne is charged with violating Section 1954 and Defendant Porter is charged with aiding and abetting Defendant Towne. Count V charges Defendant Fitzsimmons with violating Section 1954, and Defendant Collins is charged with violations of Section 1954 in Counts IV, VI, VII, and VIII.

certain persons affiliated with the
inistration of union benefits funds.[2]
adly stated, the government claims
t certain entities which provide health
e related services and which were
egedly controlled by certain defendants,
eived favorable contracts with the
higan Conference of Teamsters Welfare Fund
lfare Fund) in exchange for gratuities and
er things of value given to other
endants who were associated with the
inistration of the Welfare Fund.

This matter is presently before the
rt on Defendants Fitzsimmons' and Towne's
ion to dismiss various counts of the
ictment on the ground that prosecution is
red by the five-year statute of
itations set forth in 18 USC Section 3282.
cifically, Defendant Fitzsimmons moves to
miss Counts I, II and V, and Defendant

---

e text of Section 1954 is set out infra at
te 3.

owne moves to dismiss Counts I, II and III. he Court heard oral arguments with respect o these motions on November 18, 1985. On ecember 23, 1985, the Court denied both otions, ruling from the bench. This emorandum opinion sets forth the basis for hose rulings.

ounts III and V

The defendants' first argument ocuses on Counts III and V of the ndictment. In Counts III and V, Defendant owne and Defendant Fitzsimmons, espectively, are charged with violating 18 SC Section 1954.[3] Count V states in elevant part:

Section 1954 provides in part:

Whoever being --

(1) an administrator, officer, trustee, custodian, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

3 (co

empl

whos

empl

memb

cour

orga

serv

any

mone

inte

of h

rela

such

indi

give

gift

prob

ntinued)

(2) an officer, counsel, agent, or
oyee of an employer or an employer any of
e employees are covered by such plan; or

(3) an officer, counsel, agent, or
oyee of an employee organization whose
ers are covered by such plan; or

(4) a person who, or an officer,
sel, agent, or employee of an
nization which provides benefit plan
ices to such plan receives or solicits
fee, kickback, commission, gift, loan,
y, or thing of value because of or with
nt to be influenced with respect to, any
is actions, decisions, or other duties
ting to any question or matter concerning
plan or any person who directly or
rectly gives or offers or promises to
or offer any fee, kickback, commission,
, loan, money, or thing of value
ibited by this section, shall be fined

[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate, . . . FRANCIS RICHARD FITZSIMMONS . . . unlawfully and knowingly agreed to receive and solicited money and things of value from Edward J. Brown, Roger Towne and Terrance L. Porter, to wit, United States currency and future employment and business associations with Terrance L. Porter, DPS and other companies managed and controlled by Edward J. Brown and Roger Towne, as a fee, kickback, commission, gift, loan, money and things of value, because of the actions, decisions and duties of FRANCIS RICHARD

---

3 (continued)

not more than $10,000 or imprisoned not more than three years, or both [.]

FITZSIMMONS relating to questions and matters concerning the Welfare Fund . . . .

Similarly, Count III states in part:

> [f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate, . . . ROGER TOWNE . . . unlawfully and knowingly offered, agreed and promised to give at a later time to Francis Richard Fitzsimmons, money and things of value, to wit, United States currency and future employment and business associations with . . . DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Francis Richard Fitzsimmons,

relating to questions and matters concerning the Welfare Fund . . .

Both defendants contend that the indictment alleges an offense under section 1954, the prosecution of which is barred by the five-year statute of limitations set forth in 18 USC Section 3282.[4] Referring the Court to the phrase "[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate," the defendants argue that the indictment alleges violations of section 1954 as a continuing offense. The defendants further argue that such an allegation is improper in light of the Supreme Court's decision in **Toussie** v **United States**, 397 US 112 (1969). They urge the Court to construe section 1954 as describing

---

[4] Section 3282 sets forth the statute of limitations generally applicable to federal criminal prosecutions:

three discrete acts which, if committed with the requisite intent, constitute an offense. If the statute were so construed, defendants contend that the indictment charges them with

---

4 (continued)

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

There being no contrary provisions applicable to this case, both parties agree that section 3282 governs the instant prosecution.

committing a violation on April 23, 1979.[5] Because the indictment was not returned until December 21, 1984, the defendants conclude

---

[5] The defendants argue that because the indictment alleges April 23, 1979 as the onset date of the violation, that date must be the date upon which the alleged violations of section 1954 occurred. The defendants, however, do not explain how this Court could make such a determination, prior to hearing the evidence, assuming the Court accepts their argument that a violation of section 1954 cannot be pled as a continuing offense.

that prosecution is barred by the statute of limitations.[6]

Initially, the government responded by arguing that resolution of the statute of limitations issue should be deferred until trial on the general issues. According to the government, the precise time at which the solicitation or agreement occurred is a question of fact to be resolved by the jury. This argument, of course, suggests that section 1954 describes discrete acts, as opposed to acts which are continuous in nature. In its supplemental response,

---

[6] Alternatively, the defendants argue that Counts III and V are facially deficient because the allegations of time are insufficient to apprise Fitzsimmons and Towne of the charges against them. See **Russell** v **United States**, 369 US 749 (1961). The Court concludes that this argument is without merit.

however, the government made clear that Counts III and V charge Fitzsimmons and Towne with committing continuing offenses.

As a general rule, the statute of limitations begins to run when an offense is complete; that is, when every essential element of the offense has occurred. **Pendergast** v **United States**, 317 US at 115. The doctrine of continuing offenses is an exception to the general rule. See **Toussie**, 397 US at 115. Under the doctrine, the statute of limitations does not begin to run from the date of the commission of the initial act, even though all of the essential elements of the offense might be present. Instead, "in the case of a 'continuing offense' the crime is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues." Id. at 124 (White, J., dissenting) (citing **United States** v **Cores**, 356 US 405, 409 (1958); **United States** v **Kissy**, 218 US 601, 607 (1910); Model Penal

e Section 1.07, Comment Tent. Draft No. 5,
6), see generally 21 Am Jur 2d Criminal
Section 226 (1981).

Resolution of the statute of
itations issue with respect to Counts III
V depends upon the applicability of the
tinuing offense doctrine to the statutory
ense described in section 1954. In
ssie, the Supreme Court set forth the
nciples of statutory construction which
t guide this Court's decision in this
ard. Specifically, the Court stated:

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is

designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such time limits may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' **United States** v **Scharton**, 285 US 518, 522 (1932)." **United States** v **Habig**, 390 US 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." **Pendergast** v **United**

States, 317 US 412, 418 (1943); see **United States** v **Irvine**, 98 US 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 USC Section 3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for ail practical purposes, extends the statute beyond its stated terms." 410 F2d, at 1158. These considerations do not mean that a particular offense should never be construed as a

> continuing one. They do, however, require that such a result should not be reached unless the explicit language of the statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

397 US at 114-15 (emphasis added).

In the instant case, the Court is persuaded a violation of section 1954 may be pled as a continuing offense because "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Id. at 115. The Court is of the opinion that section 1954 describes a course of conduct, beginning with a solicitation or offer and culminating in actual receipt of a bribe or kickback, which is inherently capable of continuing over an

ended period of time.[7] This conclusion is
ported by the legislative history of
tion 1954.

Section 1954 was added to Title 18
conjunction with the 1961 amendments to
Welfare and Pension Plans Disclosure
of 1958. See S. Rep. No. 908, 87th
g., 1st Sess. 2 (1961); H. R. Rep. So.
, 87th Cong., 1st Sess. (1961), reprinted
1962 U.S. Code Cong. & Ad. News 1532,
8-39. The overall purpose of these
ndments, including section 1954, was to
er and sanction identified abuses in the
inistration of employee welfare and
sion funds. S. Rep. No. 908 at 1-II. More
cifically, section 1954 was designed to
l with complex kickback schemes and

---

e Court notes that no court has directly
ressed the issue presented by this aspect
the instant motion. Both the government
the defendants urge the Court to

7 (continued)

analogize two decisions construing 18 USC Section 201. Section 201 in general prohibits the payment of kickbacks, bribes, and other things of value to a public official for the purpose of influencing the official in the performance of his public duties. The Court has reviewed the authority cited by both parties and finds that these cases do not squarely confront the issue at hand. In **United States** v **Niederberger**, 580 F2d 63 (3d Cir 1978), the court indicated that a violation of section 201 may be continuing for purposes of determining proper venue. **Toussie**, however, clearly suggests that the fact that an offense is continuing for purposes of venue does not necessarily mean that the offense is continuing for purposes of applying the statute of limitations. See 397 US at 120-21 n. 16. In **United States** v **Hare**, 618 F2d 1085 (4th Cir

ontinued) 1980), the court held that
secution under section 201(g) was barred
re an indictment was returned in 1979
rging that the defendant had received a
n of $11,000 with favorable interest and
ayment provisions on May 29, 1970. The
rt, however, clearly indicated that its
ding was limited to the facts of that
e. 618 F2d at 1087. **Hare** is
tinguishable from the instant case on its
ts. In **Hare**, the defendant was charged
h receiving something of value in
lation of section 201(g). The act of
eiving is by its very nature an
tantaneous event. In contrast, the
endants in this case are charged with
eeing to receive and give things
value in the future, which suggests a
tinuing transaction or series of
nts.

particularly kickback schemes related to the procurement of insurance contracts through an employee welfare fund for the benefit of participating employees. Id. at 15. Examples of the type of schemes which section 1954 is intended to prohibit were described in the Senate Report:

> [o]ne complex example is the use of the straight bribe to obtain a loan from the fund. To achieve this result a cash payment is made prior to obtaining the loan to a third party ostensibly unrelated to the fund. The loan itself will then be made in an amount large enough to cover the previous payoff with high-risk real estate or otherwise questionable security as collateral. The bribe or kickback is consummated when the third party passes part or all of the bribe back to the trustee of the fund.

Where the fund is unable to lend the money immediately, a letter of credit can often be purchased to achieve similar ends. The letter of credit makes interim financing possible, and actual financing is usually secured from legitimate from legitimate sources after the high-risk hotel or restaurant, for example, is constructed. Sometimes the bribe takes the form of a part interest given to a third party in the business venture to be financed, or the loan will be obtained from a friendly bank in return for a time deposit by the fund. Each of these transactions, often involving millions of dollars, result in an improper exercise of the administrator's fiduciary responsibilities.

Id. These examples clearly buttress the court's conclusion that section 1954 was intended to proscribe a continuous pattern of activity as opposed to a single, instantaneous act.

Inasmuch as the indictment properly alleges violations of section 1954 as continuing offenses, the defendants' argument that prosecution for those offenses is time-barred is without merit. The indictment was returned on December 21, 1984 and alleges that the violations of section 1954 continued until January 2, 1980. Thus, the indictment on its face alleges an offense which occurred during the five-year period immediately preceding the return of the indictment. The Court, however, recognizes that the indictment in this case was returned within twelve days of the expiration of the statute of limitations. Accordingly, Defendants Fitzsimmons and Towne may assert a successful statute of limitations defense at trial if the government fails to prove that

the course of conduct continued into that twelve day period.

Count I

Defendants Fitzsimmons and Towne also move to dismiss Count I of the indictment. Their argument in favor of this motion is premised entirely on the assumption that the Court would dismiss Counts III and V as time-barred.[8] Inasmuch as the Court will deny the defendants' motion to dismiss Counts III and V, the Court need not address their arguments for dismissal of Count I.

Count II

Finally, both defendants move to dismiss Count II as it applies to them, again arguing that prosecution is time-barred. Count II charges Defendants Fitzsimmons and Towne, as well as their codefendants, with

---

[8] Essentially, the defendants argue that if Counts III and V were dismissed, dismissal of Count I would also be required because

conspiracy to violate RICO, under 18 USC Section 1962(d). The defendants assert a two-prong argument in support of this aspect of their motion. First, they argue that the indictment fails to allege their participation in the conspiracy during the five-year period immediately preceding the return of the indictment. The defendants take the position that in order to prove participation in a RICO conspiracy, the government is required to allege and prove

---

8 (continued) the indictment would fail to allege the commission of at least one predicate act during the five-year period immediately preceding the return of the indictment. See **United States** v **Sinito**, 723 F2d 1250, 1260 (6th Cir.), cert. denied, ___ US ___, 105 S Ct 86 (1984); see also **United States** v **Field**, 432 F Supp 55, 59 (SDNY 1977), aff'd mem., 578 F2d 1371 (2d Cir) cert. denied, 439 US 801 (1978).

hat each defendant personally committed two redicate acts, at least one of which ccurred within a period not barred by the tatute of limitations. Alternatively, the efendants argue that even assuming the overnment is not required to prove the ersonal commission of two predicate acts, he indictment fails to allege any objective anifestation of their agreement to articipate in the conspiracy within the pplicable five-year period.

The Court concludes that these rguments are without merit. First, the efendants contention that the government s required to allege and prove that a efendant personally committed two predicate cts in order to prove his agreement to articipate in a RICO conspiracy has been

expressly rejected by the Sixth Circuit.[9] In **United States** v **Joseph**, No. 85-1144 (Jan. 16, 1986), the court held that reversal of the

---

[9] The defendants rely on the Sixth Circuit Court's opinion in United States v Sinito, 723 F2d 1250 (1983), cert. denied, ___US ___, 105 S Ct 86 (1984) in which the court stated in relevant part:

> The government, in an attempt to prove a RICO violation under 18 USC Section 1962(c) must establish: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant "associated with" the enterprise; (3) that the defendant participated in the enterprise's affairs; and (4) that the participation was through a pattern of racketeering activity.

defendant's conviction under 18 USC Section 894 was required because the conviction was based on insufficient evidence. Slip op. at 9. The court then addressed the effect of that reversal on the defendant's RICO convictions:

> Our conclusion that Joseph's conviction on the 18 USC Section 894 count must be reversed, excludes one of the predicate acts relied on by the district court in convicting Joseph pursuant to 18

---

continued) * * * In addition to proving the foremention elements, proof of a RICO conspiracy requires the existence of an agreement. An agreement can be shown if "the defendant . . . objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes."

USC Section 1962(c). Accordingly, Joseph's conviction pursuant to 18 USC Section 1962(c) must be reversed.

We reach a different conclusion with respect to the conspiracy count, 18 USC Section 1962(d). For a conspiracy conviction it is not necessary to prove that the defendant agreed to personally commit the requisite acts, but only that he agreed that another violate Section 1962(c) by

---

9 (continued) 723 F2d at 1260, 1261 (citations and footnote omitted). While these statements might be interpreted as requiring proof that a defendant personally committed two predicate crimes, the court's opinion in **United States** v **Joseph**, **supra**, clearly rejects that interpretation.

committing two acts of racketeering activity. . . . Therefore, even though we find that one of the predicate acts relied on by the district court was insufficient, this does not foreclose a finding of guilt since Joseph may have agreed that others would commit the predicate acts.

lip op. at 10-11 (citations omitted).

The indictment in this case atisfies **Joseph**. It alleges that Defendants itzsimmons and Towne participated in a RICO onspiracy by agreeing to the commission of wo or more predicate acts. The indictment urther alleges that the conspiracy continued nto the applicable five-year period. ccordingly, the Court perceives no basis for olding that prosecution under Count II of he indictment is time-barred.

Nevertheless, the defendants ontend that the government is required to llege some "objective manifestation" of

their agreement to participate in the conspiracy which occurred during the period not barred by the statute of limitations. To the extent that the defendants equate an "objective manifestation" with an overt act, this argument is clearly without merit. The sixth circuit recently held that a RICO conspiracy conviction does not required proof of an overt act. **United States** v **Tripp**, No. 85-1031, slip. op. at 7 (Jan. 16, 1986). Because RICO conspiracy does not require proof of an overt act, "the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period." **United States** v **Coia**, 719 F2d 1120, 1124 (11th Cir 1983), cert. denied, ___ US ___, 104 S Ct 2349 (1984) (cited with approval in **United States** v **Tripp**, **supra**). As to a particular defendant, if the government proves that he was a member of the conspiracy, he is presumed to continue to be a conspirator until there is an affirmative

howing that he withdrew from the conspiracy. **nited States** v **Hamilton**, 689 F2d 1262, 1268 6th Cir 1982), cert. denied sub nom., **alisbury** v **United States**, 459 US 1117 (1983) quoting **United States** v **Mayes**, 512 F2d 637, 42 (6th Cir), cert. denied, 422 US 1008 1975)); see also **United States** v **Etheridge**, 24 F2d 951 (6th Cir. 1970), cert. denied, 400 S 993, reh'g denied, 401 US 926 (1971). hus, an indictment satisfies the statute of imitations with respect to a particular efendant if it alleges that he was a member f a conspiracy which continued into the imitations period. The defendant bears the urden of asserting his withdrawal prior to he limitations period as an affirmative efense.[10] **United States** v **Battista**, 646 F2d

---

[10] In **United States** v **Read**, 658 F2d 1225 1981), the Seventh Circuit described the ffect of asserting withdrawal as an ffirmative defense:

237, 246 (6th Cir), cert. denied, 646 US 1046 (1981); **Blue** v **United States**, 138 F2d 351, 360 (6th Cir 1943), cert. denied, 322 US 736-37 (1944). In other words, the indictment need not contain negative allegations; that is, it need not allege that a particular defendant did not withdraw from the conspiracy prior to the limitations period.

For the reasons set forth above, Defendants Towne and Fitzsimmons' Motion to Dismiss the Indictment on the Ground that the

---

10 (continued) Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. . . . By definition, after a defendant withdraws he is no longer a member of the conspiracy and later acts of the conspirators do not bind him. The defendant is still liable, however, for his previous agreement and for

ffenses Charged are Barred by the Statute of imitations is DENIED.

)

(continued) the previous acts of his coconspirators in pursuit of the conspiracy. . . . Withdrawal is not, therefore, a complete defense to the crime of conspiracy. Withdrawal becomes a complete defense only when coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. If the indictment is filed more than five years after a defendant withdraws, the statute of limitations bars prosecution for his actual participation in the conspiracy.

l. at 1232-33 (citations omitted).

RALPH M. FREEMAN

United States

District Judge

DATE: February 25, 1986.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES F. COLLINS,

FRANCIS RICHARD

FITZSIMMONS,

SOL C. SCHWARTZ, and

ROGER TOWNE,

Defendants.

/

Crim. No.

84-20715

Hon. Ralph

M. Freeman

MEMORANDUM OPINION

On September 19, 1986, the jury returned verdicts in this case, following a lengthy trial. Only Defendant Porter was wholly acquitted of the offenses charged. Defendant Schwartz was acquitted as to Count I but convicted of the offense charged in Count II. Similarly, Defendant Towne was

acquitted as to Count I and convicted as to Counts III and V. Finally, both Defendant Fitzsimmons and Defendant Collins were convicted of each of the offenses with which they were charged in the indictment.[1] This matter is presently before the Court on various post-trial motions brought by the defendants.

---

[1] The charges in the indictment can be summarized as follows: Count I charged all of the defendants with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC Section 1962(c). Count II charged all of the defendants with conspiring to violate section 1962(c) of RICO, in violation of 18 USC Section 1962(d). The remaining six counts charged various defendants with violations of 18 USC Section 1954.

MOTIONS FOR NEW TRIAL

All of the defendants move for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The rule provides in relevant part: The court on motion of a defendant may grant a new trial to him if required in the interest of justice." A motion brought under Rule 33 is addressed to the trial court's sound discretion. See, e.g., **United States** v **Barlow**, 693 F2d 954, 966 (6th Cir 1982, cert. denied, 461 US 945 (1983). As a general principle, however, "[mlotions for a new trial are not favored and are granted only with great caution." **United States** v **Garner**, 529 F2d 962, 969 (6th Cir), cert. denied sub nom., **Brown** v **United States**, 426 US 922 (1976). Where the court is convinced that errors in the trial proceedings, either "singly or in combination, have resulted in a miscarriage of justice, a new trial should be granted. See **United States** v **Narciso**, 446 F Supp 252, 303-04 (ED Mich 1977) (Pratt, J.).

The Court will next consider each of the motions for a new trial, in light of these guiding principles.

COLLINS

Defendant Collins moves for a new trial on the ground that he was denied a fair trial as the result of prosecutorial misconduct. In the alternative, Defendant Collins urges the Court to conduct an evidentiary hearing to investigate the extent of prosecutorial misconduct during the trial of this case. In support of this motion, Defendant Collins identifies approximately seven categories of misconduct, in which he contends the prosecutor engaged.[2] He argues

---

[2] Defendant Collins identifies the following acts of misconduct: manipulation of witnesses, interference with defense counsels' attempts to interview government witnesses; a continuing pattern of deceit and deception; creation of false and/or that

that taken as a whole, these alleged acts of misconduct are sufficient to warrant a new trial.

The Court has carefully reviewed the proceedings in this matter and is not persuaded that the prosecutor's conduct denied these defendants a fair trial. Moreover, the Court perceives no basis for conducting an evidentiary hearing in order to discover additional alleged acts of misconduct, not presently reflected in the record. Accordingly, Defendant Collins' motion for a new trial will be denied.

SCHWARTZ

Defendant Schwartz moves for a new trial on the ground that he was denied a fair

---

[2] (continued) misleading interview memoranda; intentional eliciting of inadmissible testimony; misuse of summary exhibit 293; and abuse of trial subpoenas.

trial as the result of the Court's conditionally were later stricken from evidence. Specifically, the Court conditionally admitted Government Exhibits 251[3] and 252[4] under the Enright doctrine.[5] At the close of the prosecution's case-in-chief, the Court held that the Exhibits must be struck because the prosecutor had failed to establish a preponderance of the evidence

---

[3] Exhibit 251 was a letter from Ed Brown to Allen Dorfman.

[4] Exhibit 252 was a letter which purported to be written by Roger Towne to Allen Dorfman. Marge Thomas testified that the letter was in fact written by Ed Brown for Roger Towne's signature.

[5] See **United States** v **Enright**, 579 F2d 980 (6th Cir 1978); see also **United States** v **Vinson**, 606 F2d 149 (6th Cir 1979), cert. denied, 644 US 1074 (1980).

that the statements were made in furtherance of the conspiracy charged. The Court also admitted, and later struck, certain testimony by Judith Burke relating[6] to Defendant Schwartz. Finally, the Court admitted certain testimony by Lesa Young, which related in part to Defendant Schwartz, and later held that the testimony[7] would be admissible only as to Defendant Collins. The Court offered to give an appropriate cautionary instruction in connection with its ruling but Defendant Schwartz declined the Court's offer.

Having carefully considered the arguments raised in support of this motion, the Court is not persuaded that Defendant Schwartz was denied a fair trial. In conditionally admitting and later striking

---

[6] See Defendant Schwartz's Motion for a Mistrial, filed July 28, 1986, pp. 5-15.

[7] Id. at pp. 22-23.

the evidence of which Defendant Schwartz complains, the Court followed a procedure specifically approved by the Sixth Circuit in **United States** v **Vinson**, 606 F2d at 153. Moreover, in accordance with **Vinson**, the Court considered the prejudicial effect of this evidence when it ruled on Defendant Schwartz's motion for a mistrial, brought at the close of the government's case-in-chief. For the reasons then stated, the Court denies case Defendant Schwartz's motion for a new trial.

TOWNE

Defendant Towne moves for a new trial on two grounds. First, he argues that the admission of Charles Collins' and Genevieve Fitzsimmons' grand jury testimony violated his sixth amendment right to confront the witnesses against him. In a lengthy memorandum opinion filed on July 18, 1986, the Court rejected Towne's argument that the admission of this grand jury testimony violated his sixth amendment

rights. For the reasons stated in that opinion, the Court will deny Defendant Towne's motion for new trial insofar as he claims a violation of his sixth amendment rights.

Defendant Towne asserts a violation of his fifth amendment right to remain silent as the second ground for granting a new trial. Specifically, Towne argues that comments made by witnesses Linda Riffle and Marge Thomas, to the effect that the prosecutor should ask certain questions of Roger Towne, constituted an impermissible reference to his decision not to testify. The Court notes that Defendant Towne has cited no authority which supports his argument. Inasmuch as the Court is persuaded that the prosecutor did not solicit these comments, nor did he attempt to emphasize the arguable inappropriate response, the Court will deny Defendant Towne's motion for a new trial insofar as he claims a violation of his fifth amendment rights.

FITZSIMMONS

Defendant Fitzsimmons moves for a new trial on the ground that certain inadmissible evidence was presented to the jury and that the evidence was so prejudicial that a cautionary instruction could not protect his right to a fair trial. Specifically, Defendant Fitzsimmons refers the Court to the testimony of Judith Burke regarding a comment made to Ed Brown by Frank Fitzsimmons and Burke's testimony regarding Brown's monthly business visits to Genevieve Fitzsimmons. Defendant Fitzsimmons further argues that he was incurably prejudiced by comments made by the prosecutor during closing arguments, referring to Fitzsimmons as an "ex-con" and referring to Ms. Burke's testimony, described above, which had been stricken.

Having carefully considered the arguments raised by Defendant Fitzsimmons in support of this motion, the Court concludes that Defendant Fitzsimmons was not denied a

fair trial. Accordingly, his motion for a new trial will not be denied.

MOTIONS FOR JUDGMENT OF ACQUITTAL AND/OR ARREST OF JUDGMENT

Defendants Schwartz, Towne and Fitzsimmons move for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Rule 29 provides, in relevant part:

> (c) Motions After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no

> verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Fed. R. Crim. P. 29(c).

A motion for judgment of acquittal, thus, tests the sufficiency of the government's evidence. In ruling on a motion brought under Rule 29, the trial court must consider the evidence in the light most favorable to the government. See, e.g., **Glasser** v **United States**, 315 US 60, 80 (1942); **United States** v **Adamo**, 742 F2d 927, 932 (6th Cir 1984), cert. denied, 105 S Ct 971 (1985). Moreover, the government is entitled to the benefit of all reasonable inferences which can be drawn from the evidence, even though the evidence may be circumstantial. See, e.g. **United States** v **Prieur**, 429 F2d 1237, 1238 (6th Cir 1970).

The test is whether based on the evidence taken as a whole and considered in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom, a rational trier of fact could find the defendant guilty beyond a reasonable doubt of the offense or offenses charged. **Adamo**, 742 F2d at 932. In making its determination, the trial court cannot weigh the evidence nor judge the credibility of witnesses. **United States** v **Wolfenbarger**, 426 F2d 992, 994 (6th Cir 1970); **United States** v **Luxemberg**, 374 F2d 241, 248 (6th Cir 1967); see also **Burks** v **United States**, 437 US 1, 16 (1978).

Defendants Towne and Fitzsimmons also move, in the alternative, for arrest of judgment pursuant to Rule 34. The rule provides:

> Rule 34. Arrest of Judgment
> The Court on motion of a defendant shall arrest judgment if the indictment or information does not

> charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 34.

Unlike a motion for judgment of acquittal, a motion under Rule 34 tests the sufficiency of the indictment rather than the sufficiency of the evidence presented at trial. See generally, C. Wright, Federal: Practice and Procedure: Criminal 2d Section 571-72 (1982).

The Court will address the merits of each of the motions for judgment of acquittal and/or arrest of judgment, in light of these guiding principles.

SCHWARTZ

Defendant Schwartz moves for a judgment of acquittal on the ground that the government's evidence was insufficient to support a conviction. Defendant Schwartz was convicted of the offense charged in Count II, that is, conspiracy to violate RICO. The Court has carefully considered the evidence introduced against the evidence introduced against Defendant Schwartz and concludes that, when the evidence is considered in the light most favorable to the government, a rational juror could find him guilty beyond a reasonable doubt.[8] Accordingly, Defendant Schwartz's motion for judgment of acquittal is denied.

---

[8] The Court will not attempt to summarize the evidence presented over the course of an eight month trial in order to support its decision on this motion.

FITZSIMMONS AND TOWNE

As already stated, both Defendant Fitzsimmons and Defendant Towne move for a judgment of acquittal or, on the alternative, arrest of judgment. Both defendants raise two arguments in support of their motions. First, they argue that their prosecution was barred by the five-year statute of limitations set forth in 18 USC Section 3282. Second, the defendants argue that 18 USC Section 1954, which in essence provided the basis for all of the charges in the indictment, is unconstitutional. For the reasons stated in connection with the Court's ruling on the defendants' motions for judgment of acquittal brought at the close of the government's case-in-chief, the Court rejects the argument that section 1954 is unconstitutional. Thus, the only issue is whether the Court should reconsider its ruling that the indictment properly charges offenses, the prosecution of which is not barred by the statute of limitations.

Defendants Fitzsimmons and Towne first raised the statute of limitations issue in a pretrial motion to dismiss the indictment. The basis of their motion to dismiss, as well as the present motion, can be best understood by focussing on the argument as it relates Defendant Fitzsimmons. Fitzsimmons first referred the Court to Count V of the indictment, which charged him with a violation of 18 USC Section 1954. Specifically, Count V alleged that the violation occurred "[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate." Fitzsimmons argued, and the government conceded that Count V alleged the violation of section 1954 as a continuing offense. Fitzsimmons further argued that under the Supreme Court's decision in **Toussie** v **United States**, 397 US 112 (1969), section 1954 must be interpreted as prohibiting a series of discreet acts as opposed to describing a continuing offense. Accordingly, he urged the Court to dismiss

Count V of the indictment. Defendant Towne raised the same argument with respect to Count III, which charged him with a corresponding violation of section 1954.

With respect to Count I, which charged a substantive RICO violation, Fitzsimmons argued that the indictment should be dismissed because it failed to allege any act of racketeering within the five-year period immediately preceding the return of the indictment. Under section 1962(c) of the RICO statute, the government is required to allege and prove that a defendant committed two acts of racketeering, at least one within the limitations period, in order to convict a defendant of a substantive RICO violation. See **United States** v **Sinito**, 723 F2d 1250, 1260 (6th Cir), cert. denied, 469 US 817 (1984). In the present case, the only act of racketeering alleged to have been committed by Defendant Fitzsimmons within the limitations period was the section 1954 violation alleged in Count V. Accordingly,

Fitzsimmons urged the Court to also dismiss Count I. Although Towne raised the same argument prior to trial, the issue is moot as it applies to him because he was acquitted of the offense charged in Count I.

Finally, Defendant Fitzsimmons moved to dismiss Count II, which charged him and his co-defendants with RICO conspiracy, in violation of 18 USC Section 1962(d). Essentially, Fitzsimmons argued that the indictment failed to allege an "objective manifestation" of his agreement to participate in the conspiracy during a period not barred by the statute of limitations. According, he urged the Court to dismiss Count II. Defendant Towne made substantially the same argument with respect to the conspiracy charge.

In a memorandum opinion filed on February 25, 1986, the Court denied the motions to dismiss. In essence Defendants Fitzsimmons and Towne urge the Court to reconsider that ruling, in connection with

the motions presently before the Court. Having carefully considered, and reconsidered, these arguments throughout the course of this trial, the Court is now persuaded that section 1954 proscribes discrete acts as opposed to acts capable of continuing over an extended period of time. Accordingly, the Court will grant the motions for arrest of judgment insofar as they relate to Counts I, III and V. Moreover, the Court vacates its decision of February 25, 1986, to the extent that it is inconsistent with this decision. With respect to Count II, however, the Court is still not persuaded that the prosecution of these defendants was time-barred. Accordingly, for the reasons set forth in the Court's February 25, 1986 Memorandum Opinion, the Court will deny the motions for having arrest of judgment as they relate to Count II. Moreover, having carefully reviewed the evidence, and considering it in the light most favorable to the government, the Court is persuaded that

there was sufficient evidence upon which to base Defendant Fitzsimmons' and Defendant Towne's conviction under Count II. Therefore, the motions for judgment of acquittal as to Count II will also be denied.

CONCLUSION

For the reasons set forth in this opinion, each defendants' motion for a new trial will be DENIED; each defendants' motion for a Judgment of acquittal will also be DENIED; Defendant Fitzsimmons' motion for arrest of judgment will be GRANTED with respect to Counts I and V and will be DENIED with respect to COUNT II; and, finally Defendant Towne's motion for arrest of judgment will be GRANTED with respect to Count III and will be DENIED with respect to Count II. The government shall submit an appropriate order.

Ralph M. Freeman

United States District Judge

DATED: January 13, 1987.